No. 08-388

Supreme Court, U.S.
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In The Supreme Court of the United States

THE CITY OF PHILADELPHIA, PENNSYLVANIA,

Petitioner,

vs.

RICHARD LAWRENCE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly held on this factual record that plaintiffs did not have the "responsibility to engage in fire suppression" within the meaning of 29 U.S.C. §203(y) and therefore were not exempt from the overtime pay requirement of the Fair Labor Standards Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT	1
A. STATUTE INVOLVED	1
B. FACTS	1
C. PROCEEDINGS BELOW	6
REASONS FOR DENYING THE PETITION	9
A. THERE ARE NO CONFLICTING DECISIONS OF ANY COURT	9
B. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 203(y) DOES NOT EXEMPT PLAINTIFFS FROM THE OVERTIME PAY PROTECTIONS OF THE FLSA	21
1. The Decision Is Consistent with Established FLSA Jurisprudence	21
2. The Decision Is Consistent with Precedents Regarding Interpretation of Statutes	23
3. The Court's Interpretation Does Not Render Part of the Statute Meaningless	26
C. THE QUESTION PRESENTED DOES NOT WARRANT THE ATTENTION OF THIS COURT	28
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) 22

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960) 22

Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005) 23

Auer v. Robbins, 519 U.S. 452 (1997) 23

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 22

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327 (1967) 29

Cleveland v. City of Los Angeles, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006) ..... *passim*

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 22

Demarest v. Manspeaker, 498 U.S. 184 (1991) 24

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 29

Huff v. DeKalb County, No. 1:05-cv-1721-WSD, 2007 U.S. Dist. LEXIS 6398, *aff'd*, 516 F.3d 1273 (11th Cir. 2008) ..... *passim*

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986) 22

Kelly v. Robinson, 479 U.S. 36 (1986) 23

TABLE OF AUTHORITIES – Continued

Page

McGavock v. City of Water Valley, 452 F.3d 423 (5th Cir. 2006) 20, 21

Overstreet v. North Shore Corp., 318 U.S. 125 (1945) 22

Perrin v. United States, 444 U.S. 37 (1979) 23

Tony and Susan Alamo Foundation v. Sec. of Labor, 471 U.S. 290 (1985) 21

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 23

STATUTES

29 U.S.C. §203(y) ..... *passim*

29 U.S.C. §207 (2000) 1

29 U.S.C. §207(a) (2000) 1

29 U.S.C. §207(k) (2000) ..... *passim*

REGULATIONS

29 C.F.R. §541.2 (2005) 22

29 C.F.R. §541.301 22

29 C.F.R. §541.303(a) 23

29 C.F.R. §541.304(a)(1) 23

29 C.F.R. §553.212 ..... 20, 27

OTHER

U.S. Dept. Of Labor Opinion Letter, June 1, 2006 ..... 25, 26

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

145 Cong. Rec. H11500 (Nov. 4, 1999) 24, 25

STATEMENT

A. Statute Involved

This is a case under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §207 (2000) ("FLSA"). Plaintiffs work as paramedics ("FSPs") at the City of Philadelphia Fire Department ("City"). At all relevant times they have worked on ambulances, providing paramedical services exclusively. They were not employed to fight fires, and they do not fight fires. Pet. App. 38a.[1] Nonetheless, the City treated plaintiffs as "employee[s] in fire protection" under 29 U.S.C. §207(k) (2000), paying them overtime wages only when they worked more than 61 hours in an eight-day work period. Section 207(k) is a "partial exemption" to the regular FLSA rule requiring overtime pay for hours worked over 40 in a seven-day work week. 29 U.S.C. §207(a) (2000). Plaintiffs claim they were not "employee[s] in fire protection" and should have been paid overtime for hours worked over 40 per work week.

B. Facts

Except for a small subset, plaintiffs (FSPs) are paramedics who are not cross-trained in fire suppression. FSPs serve a single-function: They are

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[1] Most of the citations in support of the facts are to the Third Circuit's decision reproduced in the appendix to the Petition. Other facts supported by the record on appeal are cited to the appellate record as "R.xxxx."

paramedics whose jobs are restricted to medical duties only. Pet. App. 34a-35a. "Every substantive aspect of the [FSP] job description is medical in nature."[2] Pet. App. 11a. FSPs are not hired to fight fires and are not expected to fight fires as part of their job duties. FSPs are not dispatched routinely to fire scenes; FSPs are dispatched to a fire scene only when it is deemed necessary to have medical personnel on site. Pet. App. 41a. They go to fire scenes only rarely, and when they do, their duties, as described in their job description and Department directive, are to provide medical care. Pet. App. 38a. FSPs are evaluated annually on their performance of *medical duties* on firegrounds and elsewhere. *See, e.g.*, R.1407-1408 (MacMillan Dep. Pgs. 124-129), Pet. App. 13a-14a.

During the times pertinent to this case, plaintiffs worked as paramedics on "paramedic ambulances." Paramedic ambulances have no firefighting function and are not designated by the City as fire suppression resources. *See* Pet. App. 11a-12a, 18a. They carry no fire fighting equipment other than a small fire extinguisher, which is required in any vehicle that transports oxygen. Ambulances carry no water and are not capable of pumping water to extinguish fires. They

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[2] Petitioner asserts that "[t]he job description for FSPs provides that they receive orientation and training in use of fire equipment, and in extrication and rescue methods and techniques" (Pet. 8), but neglects to provide the rest of the sentence that was emphasized by the Third Circuit quoting the same provision: "*as applicable to paramedical work*." Pet. App. 11a-12a (emphasis in original).

carry no hoses or ladders or specialized extrication equipment. Pet. App. 18a.

Paramedic ambulances are sent to calls by dispatchers when there may be a need for advanced life support medical services. Pet. App. 12a. They are not dispatched for firefighting. *Id.* FSPs are not authorized to staff fire apparatus, and they don't; they staff ambulances. Pet. App. 17a-18a.

Per Fire Department directive (and consistent with actual practice), the role of FSPs when at fire scenes is to "stand by," ready to provide medical assistance as necessary. "The directive does not say anything about fire suppression duties of FSPs." Pet. App. 12a. When they are, rarely, sent to a fire scene, plaintiffs are required to place their ambulances in locations that do not impede their ability to leave the scene to transport patients or to go to another call if there is no need for medical services at the fire scene. *Id.* If there is an injury at the scene either to a firefighter or member of the public, plaintiffs are responsible for attending to it. *Id.*

The small subset of previously "cross-trained" paramedics, who were at one time trained in fire suppression, do the exact same job as their colleagues who are not cross-trained, which is to provide medical care and transport patients to hospitals, maintain the ambulance and do related paperwork. They work as paramedics. Pet. App. 39a-40a.

Any officer caught ordering an FSP to assist with fire suppression efforts would have been disciplined.

A Fire Chief in April 2004 told new Fire Department officers that FSPs were prohibited from fighting fires and that they would be disciplined if caught doing so. Pet. App. 16a. With only one minor exception, FSPs have not been ordered by superior fire officials to use a hose to fight fire or to engage in other fire suppression activities. Pet. App. 16a. The one exception was when a fire officer ordered a paramedic to help move a hose over a fence. *Id.* FSPs have received awards for medical duties but not for fire suppression activities.[3]

Although both firefighters and FSPs work at the City Fire Department, they are distinct positions. Pet. App. 9a. FSPs are not firefighter/paramedics. Pet. App. 34a-35a. They are not trained or certified as firefighters. When FSPs lose their medical command (ability to work under the doctor's license as a paramedic) they are fired; they are not reassigned as fire fighters because they are not trained as firefighters.

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[3] Petitioner misstates the record in stating that "FSPs have received awards for fire suppression activities." Pet. 11 n.10. For example, one award was for triaging casualties. (R.2220). The other awards referenced by Petitioner were, similarly, for medical tasks, not fire suppression. [R.1616-1617 (Gran Dep., related to R.2227)]; [R.1618-1619 (related to R.2230)]; [R.1639-1640 (Hanna Dep., related to R.2272)]; [R.1449-1450; 1454-55 (Boyes Dep. pp. 133-134, 150-151, related to R.2278)]; [R.1476-1477 (Cartagena Dep.), R.1660 (Klein Dep.) related to R.2139]; [R.1586-1587 (Bloomfield Dep., related to R.2306)]; [R.2553-2554 (McCloskey Dec., related to R.2512)]; [R.1406-1407 (MacMillan Dep., related to R.2312-13)].

R.1240-1241, 1350-1351. FSPs are issued blue helmets, firefighters are issued yellow helmets. Pet. App. 18a. Firefighters fight fires. When a fire is reported, it is the duty of the firefighters to deal with the fire. (R.20-22). As noted by the Third Circuit, in Philadelphia "[n]either the Mission Statement nor the [FSP] job description refers to any role [for FSPs] with respect to fire protection or fire suppression." Pet. App. 11a. "[A]t oral argument the City could cite no instance in which an FSP was called upon to enter a burning building to put out a fire, or was expected to perform any fire suppression duty other than a few marginal instances involving nothing more than moving a hose line." Pet. App. 13a. FSPs are called to a fire scene only for the purpose of providing medical care. Pet. App. 35a. This separation of responsibility is and was purposeful in Philadelphia – and consistent with the stated policy of its Fire Commissioner. (R.1220).

The Fire Department maintains a variety of other vehicles which, unlike the ambulances, are used for fire suppression, including fire engines and ladder trucks. Pet. App. 8a.

The City also employs ninety "First Responder Companies," staffed by firefighters (not FSPs) trained and certified as emergency medical technicians (not paramedics). These First Responders are assigned to fire engines and trucks (firefighting apparatus as distinguished from ambulances) and are used when there is a medical emergency for which a paramedic ambulance is not available. Pet. App. 18a. These First

Responders are not plaintiffs in this case. They are fully-trained firefighters whose jobs are to fight fires, and they *also* respond to medical emergencies. They are, in fact, responsible for fire suppression, notwithstanding that they also may spend a good deal of their time on non-fire related emergencies. *See* R.102, 112-116, 1782 & 1816.

C. Proceedings Below

Following cross-motions for summary judgment, the district court ruled that plaintiffs were partially exempt under section 207(k). The district court ordered judgment entered in favor of the City and dismissed the complaint. Plaintiffs appealed, and on *de novo* review the Third Circuit reversed and directed the district court to enter judgment on liability for plaintiffs and remanded for resolution of several damages issues. Pet. App. 42a. After noting "[w]e have searched the record conscientiously, but have been unable to find any general issue of material fact," and that each party, in moving for summary judgment, maintained there were no disputed issues of material fact, the court of appeals concluded that plaintiffs were not "employee[s] in fire protection activities" because they did not have the "responsibility to engage in fire suppression" as required by §203(y)(1).[4] *Id.* The Court held, on the particular facts

[4] Section 203(y)(1) requires that the employee be *both* trained in fire suppression and responsible to engage in fire suppression. The Third Circuit did not reach the specific question of whether

(Continued on following page)

in the record before it, and applying the ordinary, common meaning of the phrase "responsibility to engage in fire suppression," that the Philadelphia FSPs did not fit within the statutory exemption.[5] Pet. App. 37a-38a. The undisputed facts drove the decision.

The Third Circuit applied the ordinary, common meaning of the words of the statute, citing the dictionary definition of "responsibility":

> In order to be responsible for something, a person must be required to do it or be subject to penalty. *Cleveland*, [*v. City of Los Angeles*, 420 F.3d 981, at 989 (9th Cir. 2005), *cert.*

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the FSPs were "trained in fire suppression" under §203(y) because it found they were not responsible for fire suppression, obviating the need to explicitly rule on the "trained in" issue, leaving that issue open. Pet. App. 42a. Nonetheless, the court noted that "[t]he evidence shows that [plaintiffs] 'are not cross trained as firefighters.'" Pet. App. 41a. For this reason the facts in petitioner's brief regarding FSP training are immaterial. They are also inaccurate. For example, FSPs do not put out fires at the FSP academy. Compare Pet. 7-8 with the record (R.2751-2755; 1742, 1681, 1602, 1324, 1467, 1579, 1434, 1379, 1380-1382). And FSPs did not receive seven weeks of fire suppression instruction. Compare Pet. 6 with what the Third Circuit found as undisputed facts. Pet. App. 19a.

[5] Contrary to Petitioner's assertion (Pet. i), the Third Circuit did *not* conclude that responsibility to engage in fire suppression "requires that [plaintiffs] be cross-utilized and dispatched regularly as firefighters solely to control and extinguish fires." Instead, the Third Circuit found, on the record before it, that the FSPs were single function paramedics who could not be – and were not – called upon to engage in fire suppression activities. (Pet. App. 38a-40a).

> *denied*, 546 U.S. 1176 (2006)] (citing Webster's New World Dictionary, Third College Edition (1986)). In other words, a responsibility is something that is mandatory and expected to be completed as part of someone's role or job.

Pet. App. 37a.

Applying this standard, the Third Circuit concluded that the FSPs did not have legal responsibility for fire suppression:

> Applying that definition to the facts in the record, we cannot sustain the District Court's holding that the City has shown that the FSPs have the legal responsibility to engage in fire suppression. There is substantial evidence to the contrary. FSPs are not hired to fight fires, not even in small part; indeed, they are not expected to fight fires as part of their job duties. The job description makes no mention of fire suppression duties, but rather is medical in nature. There is no evidence of an FSP being disciplined for not engaging in fire suppression activities at a fire scene. There is no evidence that FSPs are ever dispatched to a fire scene for the purpose of fighting a fire, not even in situations when a firefighter is unavailable. There is some evidence that occasionally an incident commander may ask an FSP to help move a fire hose or that an FSP may volunteer to assist if s/he is standing by waiting to perform paramedic duties. Nevertheless, there is no evidence in the record to support the

> assertion that the FSPs are expected to engage in fire suppression as part of their job duties or that they are subject to penalty if they do not do so. Indeed, FSPs are not even called to every fire scene, and when they are, their duty, as described in their job description and Department directive, is to provide medical care.

Pet. App. 38a. The City's petition for rehearing or rehearing *en banc* was denied.

REASONS FOR DENYING THE PETITION

There is no reason for review in this Court. The court of appeals correctly applied the Fair Labor Standards Act to the facts of this case. There is no conflict between this decision and any other court of appeals decision. Indeed, every court of appeals to apply this statutory provision to the question of overtime pay for paramedics has noted the existing authority from other circuits and has not claimed the existence of any conflict. The decision here was in accordance with the long standing jurisprudence on statutory interpretation of the FLSA. Accordingly, there is no reason for review by this Court.

A. There Are No Conflicting Decisions of Any Court.

Including the Third Circuit in this case, three circuit courts of appeals have applied §203(y) to

determine the outcome of a case in the almost nine years since its enactment. The leading case is *Cleveland v. Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006). Subsequently, the Eleventh Circuit in *Huff v. DeKalb County*, 516 F.3d 1273 (11th Cir. 2008), and the Third Circuit in this case applied §203(y) to fire department paramedics using the principles enunciated in *Cleveland*.

There is no legal conflict among these circuit court decisions. All three circuits applied the ordinary, common meaning of the pertinent words of the statute to the unique facts of the cases before them. In two of these, this case and *Cleveland*, the courts found that the plaintiffs *were not in fact* responsible for fire suppression. In the third case, *Huff*, the court found that the plaintiffs *were in fact* responsible for fighting fires. As the courts themselves noted, the results differed because the facts were different. *Huff*, 516 F.3d at 1279; Pet. App. 34a-35a.

In *Cleveland*, fully trained firefighters were also "cross-trained" as paramedics. They worked on ambulances, performing purely medical tasks quite similar to those performed by Philadelphia FSPs on their jobs: The overwhelming majority of their dispatches were for medical situations having nothing to do with fires. On the rare occasions when they were dispatched to fires, their jobs at the fire scenes were medical and not fire suppression. Their ambulances were not equipped with fire fighting gear. The selection of which ambulances were dispatched to fire calls did not depend on whether ambulances were staffed

by "cross-trained" personnel or paramedics who were not also trained as firefighters, because their role at fire scenes was medical and trained firefighters assigned to ambulances were not expected to perform fire suppression work nor ordered to do so. The *Cleveland* paramedics did not do fire suppression work on their jobs. 420 F.3d at 984, 990.

Cleveland held that the paramedics were not responsible for fire suppression and therefore did not qualify for the partial exemption of §207(k). It noted that the "plain meaning" of the "responsibility" requirement meant that for those plaintiffs to have the responsibility to engage in fire suppression "they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it." *Id.* at 990. As in this case, the reality was that fire fighting was not part of those paramedics' jobs.

In *Huff v. DeKalb County*, 516 F.3d 1273 (11th Cir. 2008), the Eleventh Circuit evaluated §203(y) similarly but concluded, on the facts of that case, that the plaintiff-employees were *in fact* responsible for fire suppression activities on their jobs. Indeed, comparing the facts of *Huff* with those in the present case vividly illustrates why the Third Circuit decision is not in conflict with *Huff*.

In *Huff* the new fire chief initiated a change of policy, specifically designed to "cross-train" paramedics as firefighters and to actually use them for fire suppression work in addition to their medical duties. In doing so he gave them new job descriptions that

specifically included fire suppression duties. (516 F.3d at 1274-1275). As described by the district court in *Huff*, the chief "implement[ed] an integrated organizational structure fully capable of responding to fires with overlapping, complementary, resources. . . . These resources included cross-trained paramedics, who could be used to treat injuries or to suppress fire, or both. . . ." 2007 U.S. Dist. LEXIS 6398 at *19. As a result, the *Huff* paramedics (unlike the present plaintiffs) became fully trained firefighters and received National Professional Qualification I (NPQI) firefighting certification. 516 F.3d at 1274. Thereafter, the *Huff* plaintiffs could be assigned to fire apparatus such as fire trucks and fire engines and were regularly dispatched to fire calls. 516 F.3d at 1275. On these and other similar facts, the Georgia district court, using the same ordinary meaning of the words of the statute that *Cleveland* used, unremarkably concluded that "if a fire occurs, it is Plaintiffs' job 'to deal with it.'" *Id.* at *19.

On appeal, the Eleventh Circuit affirmed. The Eleventh Circuit first defined the phrase, "responsibility to engage in fire suppression" by reference to its ordinary, common meaning, 516 F.3d at 1279, 1280, just as the Ninth Circuit did in *Cleveland* (520 F.3d at 989-990), and as the Third Circuit did in this case. Pet. App. 37a. *Huff* found that "*Cleveland* [was] distinguishable" and that, based on the different facts before it, the *Huff* plaintiffs were responsible for fire suppression. 516 F.3d at 1279. *Huff* noted that some Plaintiffs had been assigned to ride in fire engines

and, although most of their time was spent on medical duties, "[t]here is undisputed testimony that all Plaintiffs are qualified to engage in fire suppression and must do so if ordered, whereas the *Cleveland* plaintiffs had no such obligation." 516 F.3d at 1279. And, unlike in the present case, in *Huff*

> [i]t is undisputed that all Plaintiffs have advanced firefighting training. It is also undisputed that the DCFRS has equipped them with 'turn-out' gear, sends them regularly to fire scenes, and requires them to be available to assist with fire suppression if they are needed. . . . Finally, fire suppression is in each Plaintiff's job description.

Id. at 1281-1282.

The Eleventh Circuit in *Huff* emphasized that its decision was fully consistent with the Ninth Circuit's decision in *Cleveland*: "[e]ven if we accept *Cleveland's* definition of 'responsibility,' DeKalb County has met its burden of demonstrating that the Plaintiffs have a 'responsibility' to engage in fire suppression under §203(y) since they have a real obligation or duty to engage in fire suppression." 516 F.3d at 1279.

All three courts interpreted the statute the same way; *Cleveland*:

> "Responsible" means "having an obligation to do something, or having control over or care for someone, as part of one's job or role." . . . [F]or Plaintiffs to have the "responsibility" to engage in fire suppression, they must have

> some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it.

420 F.3d 981, 990. *Huff*:

> [F]or Plaintiffs to have the "responsibility" to engage in fire suppression, they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it. *Id.* Even of we accept *Cleveland's* definition of "responsibility," DeKalb County has met its burden of demonstrating that the Plaintiffs have a "responsibility" to engage in fire suppression under §203(y) since they have a real obligation or duty to engage in fire suppression.

516 F.3d 1273, 1279. The Third Circuit:

> In order to be responsible for something, a person must be required to do it or be subject to penalty. *Cleveland*, 420 F.3d at 898 (citing Webster's New World Dictionary Third College Edition (1986)). In other words, a responsibility is something that is mandatory and expected to be completed as part of someone's role or job.

Pet. App. 37a.

The Third Circuit's decision in this case is fully consistent with both *Cleveland* and *Huff*. As the Third Circuit explicitly stated, the result differs from *Huff* because the facts are markedly different. Pet. 34a-35a, 38a. The present plaintiffs are not

cross-trained as firefighters.[6] They are instructed at the academy and ordered in the field that they are not trained or permitted or expected to engage in fire suppression, and they have not done so. (*See, e.g.*, R.508-518, 668-671 (Int.); R.1256 (Comerford Dep., p. 49); *See* Pet. App. 41a. Petitioner's Rule 30(b)(6) witness agreed that paramedics are not responsible for fire suppression; their responsibility at fire scenes is to provide medical backup for firefighters who are responsible for fire suppression. (R.1794).

Philadelphia's policy decisions regarding use of paramedics are different from those of DeKalb County, Georgia. As outlined by the former Philadelphia Fire Commissioner, in Philadelphia, firefighter duties and FSP duties are different and purposely kept separate:

> . . . two different jobs, altogether, as far as I am concerned. One deals with the medical aspects of a constituent's problems and the other deals with the extinguishment of fire. I, personally, like the idea of keeping them separate. There may be some people around the country who disagree with that . . . But the way I see it, the best paramedics are ones that are paramedics that deal with the medical aspect of it. And the best firefighters

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[6] A small subset does have prior training but they make no use of that training because the City had determined that their *responsibilities* should be identical to that of the FSPs who are not trained. *See* Pet. App. 39a-40a.

> are the ones that are strictly firefighters. I think that's the best way to keep it.

(R.1220). When asked by a City Councilman at a City budget hearing (in 2004) whether his budget decision (regarding possible cuts) would be less complicated if he had cross-trained paramedics and firefighters (whom he could then use for firefighting), the Philadelphia Fire Commissioner stated, "First of all, I don't want that. So I mean, I don't like those systems that have the cross training. I like what we have. So if I were forced to do something like that, obviously, I would have a different set of facts, but I don't like it." (R.1220).

The Third Circuit specifically addressed the Eleventh Circuit's decision in *Huff*, taking no issue with the Eleventh Circuit's analysis, but finding the decision "distinguishable" on its facts. In particular, the court emphasized that the Eleventh Circuit "based its decision principally on the fact that all of the appellants had advanced firefighter training and were required as part of their job duties to be available to assist with fire suppression if needed." Pet. App. 34a. The court noted that this case,

> [i]s fundamentally different. Here, there is no dispute that the appellants are not fully cross-trained or dual function firefighter/paramedics. The FSPs have not received advanced firefighter training. They are not certified firefighters. . . . Moreover, the FSPs are not authorized to staff fire apparatuses; they staff ambulances. . . . Finally, in this case,

> the FSPs are called to a fire scene only for the purpose of providing medical care, whereas in *Huff*, the firefighter/paramedics and fire medics were called to the scene and were then assigned to duties, which could have ranged from fire suppression to providing medical care.

Pet. App. 34a-35a. It is therefore clear that the courts of appeals themselves do not see any conflict in their holdings.

In seeking to create a conflict where none exists, the City argues that there is nonetheless a conflict between *Huff* and the decision below with respect to whether the §203(y) exemption applies only to an employee who is "assigned regularly to fire suppression duties." Pet. 24. That argument mischaracterizes the decisions. Contrary to the City's assertions in its question presented and elsewhere, the Third Circuit did not hold in this case that §203(y) requires actual engagement in fire suppression work. The court simply decided that plaintiffs had to be "responsible" for fire suppression and, using the ordinary, common meaning of the words in the statute, found as a factual matter they did not have responsibility to engage in fire suppression. Pet. App. 37a-38a. Indeed, the court cited substantial evidence to the contrary. Pet. App. 38a. The fact that the plaintiffs did not actually engage in fire suppression was undoubtedly a factor, but only one factor in the compilation of facts showing that these employees were not responsible for fire suppression work. The Ninth Circuit in

Cleveland performed a similar evaluation of the job duties of those plaintiffs, concluding on those facts that those employees were not responsible for fire suppression work. This is also how the Court in *Huff* evaluated the actual job duties of the plaintiffs. There, unlike here, the evidence supported the conclusion that the employees were, *in fact*, responsible for fighting fires if fires occurred.

The City's argument that there is a conflict because plaintiffs' responsibility for fire suppression consisted of "a deep reserve capacity on firegrounds" Pet. 24, is not supported by the record. The undisputed facts as noted by the Third Circuit are that FSPs had no "real obligation to fight fires because it is not what they were hired to do and it is not what they are expected to do as part of their job duties" Pet. App. 41a. This was the deliberate choice of the Fire Commissioner. R.1220, 1240-1241. The City's argument, on this record, is equivalent to the contention that merely being trained in fire suppression and working at a fire department is sufficient to satisfy §203(y)'s requirements. But no court applying the "employee in fire protection activities" definition in §203(y) has interpreted it this way.[7] To do so would be

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[7] While the District Court in *Huff* noted the "integrated structure" of the fire department in DeKalb County in stating that, on the facts there, the plaintiffs constituted a deep reserve of the fire suppression capacity, 2007 U.S. Dist. LEXIS 6398, *20, the facts before the Third Circuit were opposite; the policy in Philadelphia was to keep the paramedic duties separate from

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to ignore the other specific requirements in the statute, including the requirement that an employee be "responsible" for fire suppression work – that is, that fire suppression really be part of their jobs. *See* Pet. App. 37a-38a.

Huff was responding to a specific contention of the plaintiffs when it addressed the issue of whether to be exempt plaintiffs needed to have actually fought a fire. The plaintiffs there asserted that they were not and could not be responsible for fire suppression solely because some of them had never actually engaged in fire suppression. The Court dismissed this argument by noting that §203(y) does not require actual engagement in fire suppression, citing the disjunctive clause at the end of §203(y)(2). But the Court then evaluated the facts against the ordinary, common meaning of "responsibility." Unlike the "keep them separate" policy in Philadelphia, the policy in DeKalb County was to fully integrate fire suppression and Emergency Medical Services so that each employee was trained, authorized and fully capable of doing both fire suppression and medical work regardless of what type of apparatus they rode to the scene. It was undisputed that all the *Huff* plaintiffs had advanced firefighting training, were regularly sent to fire scenes, and were in fact expected to perform fire suppression work as needed. In addition,

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the fire suppression responsibility of firefighters. *See, e.g.*, R.1220. There was no "integrated structure" in Philadelphia.

> [f]ire suppression is in each Plaintiff's job description. All Plaintiffs therefore have the 'responsibility' to engage in fire suppression within the meaning of §203(y). While the actual exercise of this responsibility may be contingent on the particular demands of a fire scene, it does not make the responsibility any less real.

516 F.3d at 1281-1282. Thus, *Huff* did not rest on the single statement that plaintiffs need not actually engage in fire suppression. Instead, it rested on the many facts in the case establishing responsibility for fire suppression. Obviously, whether employees have actually engaged in fire suppression work may be relevant evidence of whether the employees had any real "responsibility" for fire suppression work, but actual engagement in that work is not the statutory test, nor has any court held that it is.

The City also suggests (Pet. 24) that the decision below conflicts with *McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006), but that case did not even involve a construction of §203(y). To the contrary, the plaintiff-employees conceded that they fell within the terms of that section, 452 F.3d at 427; the question before the court was whether the employees were nonetheless exempt under the terms of an FLSA regulation promulgated before §203(y) was enacted. That regulation, 29 C.F.R. §553.212, had set forth a rule (the "80/20 rule") requiring evaluation of the amount of work time employees spent on non-fire suppression duties. The Fifth Circuit held that this

regulation was rendered obsolete by §203(y). Therefore, §203(y) alone governed the employees in question, and it was conceded that those employees met the definition in that statute. Thus, in *McGavock* any discussion about the "responsibility" prong of §203(y)(1) is dicta.

Applying §203(y), the Court in *Huff* used the same ordinary, common meaning of "responsibility," as did the Court in *Cleveland*, and as did the Third Circuit in the present case. *Huff v. DeKalb County*, 516 F.3d at 1279 & 1280; *Cleveland v. Los Angeles*, 420 F.3d at 989-990; Pet. App. 37a. There is no conflict in the law among the circuits that have applied §203(y). Only the facts are different. And, given different facts, different results are predictable and proper.

B. The Court of Appeals Correctly Held that Section 203(Y) Does Not Exempt Plaintiffs from the Overtime Pay Protections of the FLSA.

1. The Decision Is Consistent with Established FLSA Jurisprudence.

Determining who is required to be paid overtime and who may be exempted under any of the many exemptions contained in the FLSA is and has always been a fact-specific inquiry. The rules for making this determination are well settled: the FLSA is construed liberally in favor of employees. *See Tony and Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290, 297

(1985); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). FLSA exemptions are construed narrowly against employers, and in favor of employees. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). An employer seeking to take advantage of an FLSA exemption must prove that the employees meet each element of the exemption, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974), and fit "plainly and unmistakably" within both the terms and the spirit of the claimed exemption. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). The court of appeals followed these rules. Pet. App. 23a.

Whether employees fit within an FLSA exemption has always been determined by what employees actually do on their jobs rather than by job titles or job descriptions or what employees theoretically might do but do not – in other words, "whether their particular activities excluded them from the overtime benefits of the FLSA." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). "[A]s we have repeatedly said, the application of the Act depends upon the character of the employees' activities." *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132-133 (1945). That job titles (or level of training) are not dispositive when determining exemptions is repeatedly expressed in DOL regulations. *See, e.g.*, 29 C.F.R. §541.2 (2005) (job titles insufficient); 29 C.F.R. §541.301 (2005) (learned professional's primary duty must be performance of work requiring advanced

knowledge); 29 C.F.R. §541.303(a) (2005) (training or certification not sufficient, must be "employed and engaged" in teaching); 29 C.F.R. §541.304(a)(1) (2005) (training as a lawyer or doctor not sufficient, must be "actually engaged in the practice thereof."). Petitioner ignores this well settled body of FLSA jurisprudence in its argument that §203(y) exempts "paramedics." (Pet. 17). As the Third Circuit noted, "Congress could have chosen to make all paramedics subject to the exemption, but it did not; the plain language of the statute connects the exemption to fire suppression." Pet. App. 39a.

2. The Decision Is Consistent with Precedents Regarding Interpretation of Statutes.

The Third Circuit properly followed relevant decisions of this Court on statutory interpretation. Interpretation of the meaning of statutes always starts with the words of the statutes themselves. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). There is no special definition of the word "responsibility" in §203(y), nor any implied by it. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). One valid source for the common meaning of words is the dictionary. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997); *TRW, Inc. v. Andrews*, 534 U.S. 19, 32 (2001); *Arthur Andersen, LLP v. United States*, 544 U.S. 696,

705-706 (2005). Using the ordinary meaning of the word "responsibility," the Third Circuit determined that the City had not met its burden of showing that plaintiffs have the "responsibility to engage in fire suppression," based on the facts in the record. Since §203(y) can be comfortably read using the ordinary meaning of the words used, there is no reason to go beyond the "plain language" of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

The scant legislative history offered by the City does not indicate that Congress meant to depart from the ordinary meaning of the word "responsibility" – or the longstanding FLSA jurisprudence about determining whether employees are exempt with reference to their actual job duties – let alone a specific Congressional purpose to abandon decades of FLSA jurisprudence and allow "titles" (i.e., "paramedics") of employees to determine exemption. (Pet. 17 & 21) The legislative history is actually entirely consistent with plaintiffs' position and the Third Circuit's decision in this case. On the House floor, Congressman Clay noted that the bill "provides that *where firefighters are cross-trained and* ***are expected to perform both firefighting and emergency medical services***, they will be treated as firefighters for the purpose of overtime." 145 Cong. Rec. H11500 (Nov. 4, 1999) (emphasis added). This comment echoes exactly the written statement of Hon. William F. Goodling, Chairman, House Committee on Education and the Workforce, Markup of H.R. 1693 (Nov. 3, 1999), and is precisely consistent with the Third Circuit's decision

in this case. Similarly, Congressman Boehner stated that §203(y) was designed to "ensure that *firefighters* who are cross-trained" would be covered by the §207(k) exemption even if they did not spend "*all*" their time performing direct fire fighting activities. 145 Cong. Rec. H11500 (Nov. 4, 1999) (emphasis added).

The City quotes the comment by Representative Ehrlich to the effect that §203(y) was intended to modify the "80/20 rule" contained in the earlier DOL regulations. Pet. 20. Plaintiffs agree that Congress eliminated the "80/20 rule," but nothing in Congressman Ehrlich's comments implies that §203(y) was meant to apply to employees who are neither expected to, nor likely to, fight fires. To the contrary, he stated that the section was intended to address firefighters who "in addition to firefighting" may "also" be expected to respond to other emergency calls – a formulation that excluded individuals who are not responsible for firefighting. 145 Cong. Rec. H11500 (Nov. 4, 1999).[8]

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[8] The U.S. Dept. Of Labor issued an Opinion Letter on §203(y) on June 1, 2006 that is consistent. The inquiry to which DOL responded was about cross-trained firefighter/paramedics, hired as firefighters, assigned to either suppression or ambulance apparatus (many routinely rotating between fire suppression apparatus and ambulances), who respond to all structure fires and reported smoke incidents even if there is no need for medical care, and who perform the same fire attack, ventilation, evacuation and exposure protection as firefighters and are routinely called upon to perform fire suppression. Whether they

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3. The Court's Interpretation Does Not Render Part of the Statute Meaningless.

The City's argument (Pet. 19-20) that the Third Circuit's interpretation of "responsibility" conflicts with §203(y)(2) is wrong. *See* Pet. App. 65a, n.8. The statute contains two subdivisions setting forth independent requirements for exemption as an "employee in fire protection activities." The first subdivision, §203(y)(1), requires that the employee be trained in fire suppression, and have the legal authority and responsibility to engage in fire suppression and be employed by a governmental fire department. The second subdivision, §203(y)(2), provides that an employee who satisfies subdivision (1), must *also* be engaged in either the prevention, control or extinguishment of fires, or response to emergency

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spent most of their time on fire suppression or medical tasks depended simply on the type and number of calls to which they were dispatched. But their jobs were to fight fires when there were fires, and thus DOL concluded that these employees qualified under §203(y). This Opinion Letter is entirely consistent with the decision of the Third Circuit in this case – and consistent with *Cleveland,* which is cited in the Opinion Letter. It is precisely the factual situation presented in the Opinion Letter to which §203(y) is addressed. Employees who are "responsible" for fighting fires when they occur are exempt under the firefighting exemption even if they happen to spend the majority of their work time performing other emergency work due to the infrequency of fire calls. Philadelphia FSPs, however, are different. They are not "responsible" for fighting fires when there are fires, they are not expected to do so and there is no real chance that they will. They thus are not properly exempt under the firefighting exemption.

situations where life, property, or the environment is at risk. In other words, the statute provides that if your job is to fight fires when there are fires, time spent doing other emergency services work when there are not fires does not preclude you from being an "employee in fire protection activities," regardless of whether you are called a "firefighter," "paramedic," "rescue worker," or other title.

In Philadelphia, the firefighter/EMTs assigned to the 90 First Responder Companies (Fire Engines and Fire Trucks) fall within §203(y)'s definition precisely because of §203(y)(2). Prior to the 1999 amendment enacting §203(y), these employees may have been non-exempt as a result of 29 C.F.R. 553.212 (the "80/20 rule") because they spent more than 20% of their time on medical calls (or other non-suppression calls).[9] Thus, before §203(y), Philadelphia's First Responder Firefighter/EMTs might have been held non-exempt. *See* 29 C.F.R. §553.212(a).

Section 203(y) does not do what the City is trying to make it do: exempt all employees trained as paramedics (with a few weeks' orientation to fire-ground operations) and employed by a fire department regardless of their assignment or their actual responsibilities. Indeed, it is the City's interpretation that

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[9] As a percentage of total calls for these Fire Suppression Apparatus, "assist police," "first responder" and "other emergency services" combined accounted for forty percent of calls in 2001. [R.113-116 (2001 Annual Report)].

would make part of the statute irrelevant, namely, the "responsibility to engage in fire suppression" requirement.

The statute means what it plainly says, and the City's efforts to make it say something else were properly rejected by the Third Circuit. The decision of the court of appeals holding that, based on the undisputed facts, plaintiffs were not "responsible" to engage in fire suppression, was clearly correct.

C. The Question Presented Does Not Warrant the Attention of this Court.

Even if there were some merit to the City's contention that the courts of appeals' respective interpretations of §203(y) are not in complete harmony, there is still no reason for review by this Court at this time. There is no evidence for the City's contention that the Third Circuit's decision "immediately and adversely affects the City's ability, and that of jurisdictions nationwide, to effectively provide emergency services tailored to demand and limited resources." (Pet. 25). The City's naked claim is hyperbole, at best.

The statute at issue here is relatively new. After municipalities have had some experience in operating under the statute, Congress is free to revise the statute or to make a different policy choice. Moreover, as Judge Anderson noted in his concurring opinion in *Huff*, the Department of Labor has not yet issued regulations under this statute, and such regulations

could have the effect of harmonizing any disagreements that might arise among the courts concerning its interpretation. *See* 516 F.3d at 1281. Indeed, Judge Anderson remarked that such regulations could cause the Eleventh Circuit to abandon the result it reached in *Huff*. *Id.* Thus, it would be premature for this Court to consider at this time the statutory issue presented here.

Finally, the decision of the court of appeals is interlocutory; several damages issues have yet to be litigated. There is no reason for this Court to deviate from its usual practice of awaiting the completion of proceedings in the trial court, rather than reviewing a decision of a court of appeals at an interlocutory stage. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The City's petition for a writ of certiorari should be denied.

Respectfully submitted,

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